

to traditional cable operators.⁴⁷ Congress gave the Commission a statutory mandate and authority to regulate DBS as necessary to preserve local programming.⁴⁸ Now the Commission must act on that mandate.

B. The Commission must Establish Complete Parity in Regulation of Program Carriage.

1. The Commission must extend must-carry to DBS.

Mandatory carriage of local broadcast signals represents the cornerstone of signal carriage policy. The only way to achieve regulatory parity between cable, OVS and DBS is to have the same must-carry requirement apply to all. Because the Commission cannot significantly modify cable and OVS' statutory must-carry requirement, the Commission should promulgate must-carry regulations that impose identical burdens on DBS providers.

a. DBS plans do not protect local broadcasters.

As DBS penetration increases, the harm it causes broadcasters will increase. Not only does this fail to comport with the statutory mandate to regulate DBS to avoid harm to localism, it undermines the goals of the statutorily mandated must-carry obligations on cable.

DBS has seen the political handwriting on the wall. Some providers have begun tossing out promises aimed at placating broadcaster concerns. These promises will do nothing to preserve localism.

⁴⁷See, e.g., 47 U.S.C. § 573(c)(2)(A) (surrogate franchise fees); § 573(c)(1)(B) (PEG access, must-carry and retransmission consent).

⁴⁸47 U.S.C. § 355(a).

(1) DBS providers do not have a unified must-carry proposal.

At least one DBS provider plans to provide some local off-air programming. In recent hearings before the Senate Committee on Commerce, Science and Transportation, Mr. Murdoch testified that ASkyB plans to deliver local broadcasting signals using a variety of technologies. In his written testimony, Mr. Murdoch explains his plans:

[B]y fall of this year, our goal is for 25-30% of U.S. households to be able to receive their local broadcast stations on SKY. Our targeted number grows to 50% of households by the middle of next year and to 75% or more by late next year. In the remaining 25% of households, SKY will install an antenna and a special set-top box which will receive local broadcast stations off-air and seamlessly integrate those stations into our program package and into our electronic on-screen program guide. One remote control, no clumsy A/B switches and no on-screen program guides that leave off local broadcast stations.⁴⁹

Mr. Hubbard announced at the hearings that his company, DIRECTV had decided not to carry any local programming:

I can tell you we're not going to follow suit and we and DIRECTV are not going to present local stations.⁵⁰

The absence of a unified position among the DBS providers mandates that the Commission promulgate a must-carry requirement for DBS providers.

⁴⁹Prepared Testimony at 2.

⁵⁰*Id.* at 24 (emphasis added).

(2) EchoStar/ASkyB's plans to cherry-pick stations will destroy many local stations.

(a) Spot beams would only carry 21% of the nation's television stations.

The major problem with ASkyB's scheme is the failure to carry all local stations. Rather, it appears ready to carry only the four networks and "major independents."⁵¹ The spot beam plan of EchoStar/ASkyB DBS provider will only provide local programming to about the sixty largest markets.⁵² If ASkyB carries only 5 signals in each market (four networks and one independent), the spot beam program would affect only 340 stations,⁵³ leaving approximately 1,260 stations -- 79% of the nation's stations -- without carriage.⁵⁴

(b) Carrying a national PBS feed will destroy local PBS stations.

One press report quoted a spokesperson of ASkyB that its DBS service planned to carry only a single national Public Broadcasting Services ("PBS") feed, not individual local PBS stations.⁵⁵ This would bankrupt viewer supported local PBS stations that would be cut off from their viewers. Although Mr. Murdoch has subsequently contradicted this claim, the conflicting position statements

⁵¹Murdoch Testimony, Hearing Transcript at 9.

⁵²*Id.* ASkyB plans to spot beam to approximately 75% of television households. Using data ranked by markets, this translates into all television households in the top 68 markets.

⁵³68 markets multiplied by five stations each.

⁵⁴*Television and Cable Factbook No. 65* at I-79 showing 1,585 licensed stations.

⁵⁵*Sky Executives Pitch Broadcasters*, Cable Word Magazine, Vol. 9, No. 11, March 17, 1997 at 147.

coming within only weeks of one another cast doubt on the credibility of ASkyB's subsequent assertions about local signal carriage.

(c) The death of independent television.

The testimony also appears to leave smaller independents out of any DBS carriage scenario, sentencing them to a slow but certain death. To quote Mr. Hubbard, the CEO of another DBS provider and owner of broadcast television properties:

I will tell you this as a local broadcaster, if Sky were to come to a market in which we operate a TV station, and were to carry the TV stations from that market and our station for some reason were to be left out, I think we'd be in deep, deep trouble.

I understand that Sky wants to carry the local, what he calls the major independents. I think those are carrying major sports. But I feel sorry for the poor little guy who got a TV station who is left out of the mix.⁵⁶

The admitted harm to local broadcast stations not carried by DBS providers coupled with ASkyB's constantly changing story regarding its plans to carry local stations warrants a local signal carriage mandate from the Commission.

(3) DBS plans to make local broadcast stations pay for carriage undermines the goals of must-carry.

Another undisclosed twist to the DBS plans to carry local broadcast signals undermines the very goal of must-carry -- preserving the financial viability of local broadcast stations. DBS will likely require local broadcast signals to pay for carriage.⁵⁷ This requirement can erase any financial benefit the station receives from DBS carriage. That is why Congress made payments to cable operators for

⁵⁶Hubbard Testimony, Hearing Transcript at 9 (emphasis added).

⁵⁷*News Corp., EchoStar Woo TV Stations*, Multichannel News, March 17, 1997 at 5.

carriage of must-carry stations illegal under the 1992 Cable Act.⁵⁸ The Commission must extend this payment prohibition to DBS as well.

b. DBS participation may result in modification to the must-carry model.

The Commission may need to allow integration of new technologies to satisfy mandatory carriage requirements. For example, ASkyB proposes use of a technology in smaller markets that does not require retransmission of the broadcast signal, but rather receives it over the air and integrates the signals at the set top box.⁵⁹ If this presents a viable technology, then it should satisfy the must-carry requirement so long as all local signals with must-carry status become integrated into the electronic channel guide. If the Commission considers this option, it must require all incumbent customers of the DBS provider to receive the hardware and software necessary to integrate the local signals. If allowed for DBS, to maintain regulatory parity, the Commission must allow cable and OVS to use similar methods to comply with their must-carry requirements.

This plan could advance the important public policy objective of increasing the diversity of voices on small cable systems. Set-top integration of off-air signals, in areas where off-air reception is widely available, would free-up five channels for the average rural small cable system. A small operator could remove broadcast signals from the cable system and rely on off-air reception at the customer's home. Assuming that the average small system offers 36 channels of service, this would effectively represent a 14% increase in channel capacity at a cost of only \$30 - \$40 per television set.

Before accepting this alternative, however, the Commission must carefully examine its

⁵⁸47 U.S.C. § 534(b)(10).

⁵⁹Murdoch Testimony, Hearing Transcript at 7.

viability. The facts presented by Mr. Murdoch in his April 10, 1997 testimony to the Senate Committee on Commerce, Science and Technology call into question the viability of this alternative. Mr. Murdoch stated that ASkyB would spot beam local signals into local markets at an annual cost of half a million to a million dollars.⁶⁰ For example, in a market where ASkyB gains 25,000 customers, that represents a cost of \$20 - \$40 per subscriber, year after year. Yet in rural markets, Mr. Murdoch unveils a plan that will require a one-time cost of only \$30 to \$40.⁶¹ If the methods produce the same results, why incur the significant cost of spot beaming? The cost disparity strongly suggests a serious deficiency in the off-air reception and integration proposal for small markets. SCBA encourages the Commission to fully investigate these issues.

c. DBS should support local programming where it cannot or will not carry all local signals.

DBS hurts localism. DBS does not carry local programming. DBS hurts local programmers by escaping all local public interest obligations imposed on comparable providers. DBS' failure to carry local broadcast signals, especially when coupled with widespread importation of distant competing signals in violation of the Satellite Home Viewer Act ("SHVA"), continues to harm local programmers. Full compliance with must-carry can stop much of this harm.

SCBA recognizes that immediate implementation of must-carry is not feasible for many DBS providers. Nevertheless, the harm they inflict continues each day. Therefore, rather than adopting transition periods during which localism continues to take a beating, the Commission should consider an immediately effective opt-out provision. Under this provision, a DBS provider that did not, could

⁶⁰*Id.* at 15.

⁶¹*Id.* at 18.

not or chose not to comply with must-carry requirements would pay a percentage of gross revenues into a national fund to support local program providers and distributors. This fund would help ensure the continued financial viability of local programming sources as they attempt to compete with a national service that can deliver its product at a substantially lower cost, in part because it escapes all local public interest requirements.

2. The Commission must extend other broadcast signal carriage regulations to DBS as well.

With the right to retransmit broadcast signals comes the obligation to restrict carriage of distant broadcast stations to avoid harm to local programmers. The Commission has established a network of regulations that accomplishes just that. Components of this regulatory scheme include provisions governing network non-duplication, syndicated exclusivity and the sports blackout rules.

a. Distant signal importation limits.

The Commission has imposed two important limits on cable and OVS providers' ability to import distant signals into a local market. First, if a local network affiliate has exclusive rights to network programming, a cable or OVS provider generally cannot import a distant signal affiliated with the same network into the local market.⁶² Similarly, providers cannot import a signal carrying syndicated programming for which a local station holds exclusive broadcast rights.⁶³ These rules combine to enforce exclusive programming rights that a local station may have purchased. Protecting these market exclusivity rights helps protect sources that also generate significant local programming.

⁶²47 CFR §§ 76.92-97.

⁶³47 CFR §§ 76.151-163.

Failure to impose importation limits will also destroy a local broadcaster's ability to require payment for retransmission consent. A DBS provider with the ability to import a duplicate signal has sufficient bargaining power to not only escape payment, but to require the local station to pay the DBS provider! The Commission cannot allow a result completely in conflict with Congressional intent.

b. Sports blackouts.

The Commission established a comprehensive scheme to protect local sports teams from the financial harm resulting from live telecast of home games within the home market.⁶⁴ The Commission forbids cablecasting of such games where the team's owner provides the requisite notice.⁶⁵ A multi-channel video programming provider cannot undercut the local station that blacks out the sporting event by importing a distant signal not subject to the blackout. Allowing distant signal importation under these circumstances will undermine local broadcasters.

c. Leased commercial access.

Cable operators must surrender up to 15% of their channel capacity to unaffiliated programmers.⁶⁶ Congress intended to increase the diversity of voices by removing an operator's editorial control over a percentage of its channels. This goal looked to overall diversity of speakers and has no nexus to local programming (i.e., the law did not set aside any leased access privileges exclusively for local programmers). Congress has imposed a similar but smaller set aside for DBS

⁶⁴*First Report and Order*, 20 FCC 2d 201 (1969).

⁶⁵47 CFR § 76.67.

⁶⁶47 U.S.C. § 532.

operators.⁶⁷ Unlike cable, DBS operators will likely be able to choose the programming so long as it serves the public interest. Serving the public interest is not necessarily the same as serving the local interest. So long as DBS continues to provide strictly national satellite programming, it cannot provide programming to meet the local needs of a particular community.

Comparing leased commercial access obligations to DBS public interest programming obligations is important because DBS operators have recently inferred that satisfaction of this public interest programming set aside is comparable to the localism interest satisfied by cable, OVS and local broadcast.⁶⁸ This is simply incorrect. Congress has ordered the Commission to hold DBS accountable for advancing the principle of localism.

3. The Commission must ensure small cable access to programming.

Program access remains a critical problem for most small operators. Programmers continue to charge small cable significantly higher rates than large MSOs. Small cable has formed a buying co-operative, the National Cable Television Cooperative ("NCTC"); however, several key programmers including all owned by Disney refuse to deal with NCTC. As DBS grows, it has access to cheaper and cheaper programming, making small cable competition increasingly difficult.

Further, at least one DBS provider has announced its intention to develop programming that it will offer on an exclusive basis to DBS providers.⁶⁹ DBS currently does not have to make its programming product available to cable. It should. DBS should be required to sell to small cable

⁶⁷47 U.S.C. § 335(8)(I) (requires a 4 to 7 percent set aside).

⁶⁸Murdoch Testimony, Hearing Transcript at 7-8.

⁶⁹*DBS: The 5 Burning Questions*, Private Cable & Wireless Cable, April 1997 at 18 (quoting Stanley Hubbard "USSB -- like other DBS system operators -- will seriously turn to enhanced production of exclusive DBS programming").

buying co-operatives such as NCTC. SCBA strongly urges the Commission to use its statutory mandate to protect localism to prohibit DBS from competing unfairly with providers of local programming. This includes forcing DBS to make programming available at reasonable rates to small cable.

C. The Commission must Establish Parity in Financial Regulatory Burdens.

1. Federal regulation of cable imposes significant financial burdens.

The dualistic regulatory scheme imposed on small cable also imposes significant regulatory costs. As a service regulated only at the federal level, DBS escapes many of these burdens. Another service, OVS, operates largely free from local regulation. In that case, however, Congress legislated surrogate payments that put OVS and cable on terms of financial parity. The following table compares the burdens imposed on each type of operator:

Cost/Burden	DBS	OVS	Cable
Initial capital	Cost of satellite and spectrum fees \$87.50 ⁷⁰ per customer	Cost of distribution plant	Cost of distribution plant \$750 - \$1,500 per customer ⁷¹
Local franchise fees	None	Surrogate payment required by federal law - up to 5%	Required by local franchise - up to 5%
Local PEG support	None	Surrogate payment required by federal law - match incumbent franchise	As required by local franchise
Institutional network	None	None	As required by local franchise
Dedicated PEG channels	None	Required by federal law and as negotiated with local government	As required by local franchise
Local sales tax	Federal exemption	May apply	May apply
Local property tax	Federal exemption	May apply	May apply

2. The Commission should impose surrogate payments to level the playing field.

When Congress created the OVS platform, it carefully imposed federally mandated payments to level the playing field between OVS and cable. The Commission should adopt this same approach

⁷⁰Prepared Testimony of Rupert Murdoch, Chairman and CEO, The News Corporation Limited before the Senate Committee on Commerce, Science and Transportation ("Prepared Testimony") reports total initial capital investment of \$700 million with an target of 8 million customers within 5 years.

⁷¹This represents the average cost of small cable aerial plant construction divided by average rural densities. Because the rural densities can range widely, the cost per subscriber can widely vary. In all cases, however, the capital investment of a small operator significantly exceeds that of a DBS provider.

and impose federal payment requirements on DBS to level the playing field between cable, OVS and DBS.

a. Local franchise fees.

The foregoing table shows the dramatic disparity in regulatory costs. DBS providers argue that because they have made a one time payment on the spectrum, they have no further payment obligation. SCBA disagrees. The per customer capital cost required to provide a non-local DBS service falls well below that of cable and OVS that must have local program carriage capabilities. The initial spectrum payment does not come close to initial capital saved by DBS as a result of using technology that allows DBS to escape local programming requirements. Consequently, DBS should be required to pay for the continuing use of the public spectrum.

The Commission should impose an annual spectrum fee equal to 5% of the DBS providers' gross revenues. Because the harm inflicted by DBS injures local programming, the DBS fee could either go towards a local programming support fund, or it could compensate local communities for franchise fees lost because of DBS competition with incumbent cable operators.

b. Funding of public, education and government access.

DBS should not be allowed to deplete funding for PEG access operations or capital needs. The Commission should require DBS providers to pay local communities or PEG access programmers an amount for each subscriber equal to the average cable contribution to PEG funding. This payment will compensate in part for the harm inflicted by escaping local programming requirements. This federally mandated payment merely makes the PEG operations of local franchise

authorities whole, unlike the OVS model in which the Commission required OVS operators to make duplicative payments that doubled the amount received by communities and access organizations.⁷²

c. Other franchise related costs.

DBS operators escape a variety of other costs imposed by franchises. These range from multi-million dollar institutional networks, free video hook-ups for schools and charitable organizations, local emergency alert systems and support for producing programs based on community events. These costs attach to cable because it uses transmission technology that permits the delivery of local programming. The Commission should compute a national average per subscriber amount that cable providers contribute for these costs. The Commission should require DBS operators to pay that amount for each subscriber for the benefit of schools and local governments.

d. Local property tax.

Cable operators pay substantial property taxes because of the plant necessary to deliver local programming. The Commission should level the playing field by requiring DBS providers that cannot deliver all forms of local programming to pay a comparable amount to local communities in which DBS subscribers reside.

3. The Commission should urge Congressional repeal of the DBS local tax exemption.

DBS has received an unjustifiable federal exemption from all local taxes. In light of the vast exemption DBS has from local financial burdens, SCBA has difficulty identifying any justification for the exemption. SCBA requests that the Commission report to Congress the need for repeal of

⁷²47 CFR § 76.1505(d)(1).

that exemption to allow local communities to tax competitors equally, thereby leveling the playing field and ensuring the long-term presence of competition.

D. Parity Must Be Enforceable.

1. Blatant and widespread violations of current DBS broadcast carriage provisions warrant strong enforcement measures for all DBS regulations.

SCBA members have encountered numerous cases of widespread abuses of the SHVA where DBS providers import distant network signals into markets where their subscribers could easily receive the broadcast off-the-air. Even Mr. Murdoch, while attempting to blame the problem solely on unscrupulous subscribers, admits how easily anyone can violate the law:

So that if you're living in Washington and you have direct television, you've only got to tell a little fib that you can't get the local stations, and they'll turn on stations from Atlanta and New York and so on and the local broadcasters are extremely upset by this. . . .⁷³

Contrary to Mr. Murdoch's inference that subscribers principally perpetrate the "little fib," many SCBA members have witnessed aggressive installers and franchised distributors actively engaging in these unlawful deceptions. Because signal distribution from the satellite cannot be geographically restricted with precision, the only way to maintain integrity of the distribution system is through authorizations at the site of the reception equipment. Mr. Murdoch claims that telephone verification will allow control over signal distribution. SCBA doubts this.

SCBA understands that DBS providers claim to provide periodic telephone verification of a descrambler's location. Several SCBA members have purchased DBS systems and installed them not at their home addresses, but at different office locations. Even when the members' home and office are located in different television markets, the box, despite its constant connection to a telephone line,

⁷³Murdoch Testimony, Hearing Transcript at 16.

allows receipt of programming. This suggests one of two things. Either DBS providers do not check the location of the box, or they do and fail to voluntarily enforce the provisions of the SHVA.

Because of the widespread abuses of current DBS program carriage restrictions, the Commission must accompany any new regulations with enforcement provisions. SCBA strongly encourages the Commission to promulgate enforcement provisions with teeth.

2. Any aggrieved party, including small cable, must have a right to seek enforcement of parity provisions.

Operators who know about abuses remain relatively helpless as they currently have no avenue to require enforcement. The Commission should provide all persons aggrieved by the conduct, including cable operators, standing to bring a cause of action.

3. The Commission should allow recovery of statutory damages and attorney fees for those that bring successful claims of rule violations.

For each discovered violation, dozens go undetected. Local programming providers need a mechanism that can act as a sufficient deterrent to misconduct. Borrowing from the copyright statutes, the Commission should establish significant statutory damages for each violation as well as the automatic award of attorney fees and other costs of pursuing enforcement of the Commission's rules.

IV. CONCLUSION

SCBA has set forth an aggressive plan for the regulation of DBS that has become necessary due to DBS' fast growing market penetration and lack of local programming. Today, DBS approaches 5 million subscribers. This same level of cable subscribership in 1965 triggered the Commission's imposition of must-carry and other signal carriage requirements. The regulations SCBA proposes would help create regulatory and financial parity aimed at preserving local

programming. This action is necessary to preserve localism as mandated by Congress. SCBA respectfully requests that the Commission adopt the provisions outlined by SCBA to create this parity. Only on a level regulatory playing field can competition exist on a long-term basis.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Carol L. Malmud, a secretary at the law firm of Howard & Howard, do hereby certify that a copy of the foregoing "Comments of the Small Cable Business Association" was sent via first class mail, postage prepaid to the following persons, this 28th day of April, 1997.

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